

STATE OF MICHIGAN
COURT OF APPEALS

HAMED H. ZAIDAN,

Plaintiff-Appellee,

v

MARJORIE H. ZAIDAN,

Defendant-Appellant.

UNPUBLISHED
April 12, 2005

No. 258369
Wayne Circuit Court
Family Division
LC No. 01-120824-DM

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right an order denying her motion to change custody of three minor children. We reverse and remand for an evidentiary hearing.

Defendant argues on appeal that proper cause and a change in circumstances warranted revisiting the custody order and that the trial court erred when it failed to consider whether defendant had established proper cause. Three standards of review are applicable in custody cases. Findings of fact are reviewed under the great weight of the evidence standard, and this Court will uphold the trial court's findings unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). We review for clear error the trial court's choice, interpretation, or application of the existing law. *Id.* Custody decisions are reviewed for an abuse of discretion. *Id.*

When a party seeks to modify an existing custody order, the moving party has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court can conduct a child custody hearing. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). If this initial burden is not met, then the court is precluded from holding a hearing to reexamine an otherwise valid custody order and reconsider the best interest factors. *Vodvarka, supra*, pp 508-509, citing *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996).

To constitute proper cause meriting consideration of a custody change, there must be one or more appropriate grounds which have or could have a "significant effect" on the child's well-being to the extent that custody should be reevaluated. *Vodvarka, supra*, p 511. The appropriate grounds should be relevant to at least one of the statutory best interest factors, determined on a case-by-case basis. *Id.*, pp 511-512. The "best interests of the child" factors are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

In determining whether proper causes exists, the court should keep in mind that “[p]roviding a stable environment for children that is free of unwarranted custody changes (and hearings) is a paramount purpose of the Child Custody Act.” *Vodvarka, supra*, pp 511-512, citing *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981). The court should generally limit its consideration to events occurring after entry of the most recent custody order.¹ *Id.*, p 501.

¹ Although in some cases, this general rule may not be applicable if the procedural circumstances deny a party the opportunity to present the facts to the court. See *Vodvarka, supra*, p 516.

We conclude that the trial court clearly erred in not evaluating or addressing proper cause. See *Vodvarka*, *supra*, pp 508-509. We further conclude that the record supports a finding that proper cause exists, meriting reexamination of the custody order. Defendant presented evidence that plaintiff has physically and emotionally abused their minor and adult children. The parties' two eldest sons, fourteen and twelve years old, indicated to the trial court that they fear plaintiff, they both prefer to live with defendant, plaintiff hits them, plaintiff has threatened their twenty-year-old sister, and plaintiff has threatened to take them overseas so that they never see defendant again. An email communication from plaintiff himself threatens violence against his daughter, wherein plaintiff states that he "will be her worst nightmare," that one "day she will find me at her door step or at her work and she will not like the out come [sic]," and that he was giving his "last warning . . . to her."

A second email communication, which appears to be addressed to the daughter directly, refers to her as "shit head," threatens to press charges because of items she took from his home, and tells her that she has "been a disappointment," that he wishes "we aborted you the day you were conceived," that he hopes "the pitches [sic] you surrounded yourself with would ruin your life further and further and further," and that he believes she has "turned out to be a piece of trash that is not worth a spit and I regret that I wasted all that time, money and energy on someone like you." Plaintiff ended the email by stating, "Hell to you and to them! I promise you that I will do what is in my power to ruin your &%#@!& life." Defendant has alleged that she has audio evidence that plaintiff has involved the minor children in his threats against their sister, teaching them it is the job of a father, uncle, cousin, and, most importantly, brother to kill the sister because of the dishonor she has brought on the family.

This evidence is relevant to at least four best interests of the child factors, including: (f) the moral fitness of the parties involved; (i) the reasonable preference of the child; (j) the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; and (k) domestic violence, regardless of whether the violence was directed against or witnessed by the child. MCL 722.23. Maintenance of the sibling bond is a serious issue in a custody dispute and its consideration is appropriate under several of the statutory best interests of the child factors. *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440, 440 n 2; 538 NW2d 57 (1995). Not only does the evidence indicate that plaintiff has threatened his adult daughter with violence and other pervasive means of harm, but plaintiff has initiated his threats in front of the minor children and perhaps even gone so far as to encourage their participation and instill in them a sense of duty and obligation as brothers to follow through.

Two of the children have written of plaintiff's physical abuse and their "fear" of him. Plaintiff has also threatened to separate the minor children from their mother. And finally, all three minor children, who were fourteen, twelve, and seven years old at the time of the hearing, were of sufficient age to express a preference to the court, and two of them expressed a preference to continue living with defendant. See *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992) (noting that a child as young as six is of sufficient age to express a preference); *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987) (noting that the trial court's failure to interview children who were nine and twelve years of age was error requiring reversal). These events seemed to have already had a significant effect on the two minor children who wrote letters to the court.

Second, the parties do not dispute that defendant has retained primary custody of the children in the marital home since entry of the divorce judgment, with plaintiff acting as a frequent visitor to the marital home but establishing his primary residence in Detroit with his second wife. Plaintiff testified that initially the parties thought this arrangement served the children's best interests. Defendant argues that this evidence is relevant to the best interests of the child factors (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, and (e) the permanence, as a family unit, of the existing or proposed custodial home or homes, and is likely to have a significant effect on the well being of the children. MCL 722.23. We agree.

While plaintiff has split his time between his home in Detroit and the marital home with defendant and the children, defendant has been and remains the children's primary caretaker. The fact that plaintiff himself made arrangements for defendant to retain primary custody over the children for over two years, in contradistinction to the divorce judgment, further supports defendant's position and establishes proper cause. Under the facts of this case, holding an evidentiary hearing to consider modification of the custody order, given the arrangement the parties have found to be in their children's best interests since entry of that order, is consistent with the court's mandate to uphold the purpose of the Child Custody Act by "[p]roviding a stable environment for children that is free of unwarranted custody changes (and hearings)." *Vodvarka, supra*, pp 511-512, citing *Baker, supra*, p 5. For these reasons, we find that defendant has proven that a hearing in this matter is warranted based on proper cause.

Defendant also argues that a change of circumstances supports her motion to change custody. We agree. To establish a "change in circumstances," the moving party must show that, "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka, supra*, p 513. Not just any change will suffice; the evidence must demonstrate "more than the normal life changes (both good and bad) that occur during the life of a child, and . . . that the material changes have had or will almost certainly have an effect on the child." *Id.*, pp 513-514. Courts must make the determination on a case-by-case basis, gauging the relevance of the facts presented by the statutory best interest factors. *Id.*, p 514. We initially note that review of this issue is difficult because the parties stipulated to the original custody order in the consent judgment and, according to defendant, the court granted custody without making an independent determination of the best interest factors. In any event, we were not provided with transcripts from the previous hearing in which custody was originally granted. Thus, our review is limited to findings in the record that clearly appear to have arisen since the original custody order. *Id.*, p 513.

Defendant raises five grounds to support her claim of change of circumstances: (1) the custody and care arrangement that the parties actually employed differed from the original custody order; (2) plaintiff intended to move his new wife and child in the same home with defendant and the minor children to create a "blended" family; (3) plaintiff involved the minor children in his dispute with the parties' adult daughter; (4) the minor children have been abused by and are afraid of plaintiff; and, (5) plaintiff threatened to take the children overseas so that they would never see defendant again.

With respect to the first ground, defendant argues primarily that a change of circumstances has been established because she has remained in the marital home with the

children and never relinquished custody to plaintiff during the school year as contemplated by the divorce judgment. The parties indicate that defendant never left the marital home, implying that she and the children resided there prior to the divorce. Therefore, defendant's actions alone do not indicate a change in circumstances. However, *plaintiff's* actions do. Instead of remaining in the house that was granted to him in the judgment of divorce and caring for his children as required by the custody order, plaintiff voluntarily abdicated his responsibility to provide full-time care for his children in favor of spending time with his new wife.² "The actual experience of the parties under the original custody award may itself be a significant factor in determining whether it should be modified." 24A Am Jur 2d, Divorce and Separation, §992, p 376.

In *Redder v Francis Redder*, ___ AD 3d ___, ___; ___ NYS 2d ___ (slip op 01766, p 2, issued 3/10/05), the New York appellate court found a change in circumstances and upheld a change of custody when the parties resumed living together, the defendant took a much more active role in the daily lives of the children, and the children wanted to spend more time with the defendant than permitted in the consent order. Here, instead of a more active role, plaintiff has been absent every other day, and the two older children have expressed a desire to remain with defendant. Although a change in a child's preference does not by itself constitute a change in circumstances warranting modification of custody, it may be considered as a factor. *Treutle*, *supra*, p 694; 24A Am Jur 2d, Divorce and Separation, §992, p 376. Moreover, at least one court has indicated that "the mere putting into operation of a decree may in some cases qualify as a change in circumstances." *Gonyea v Gonyea*, 375 P 2d 808 (Or, 1962). The unusual circumstances of this case – where the parties have never abided by the decree, plaintiff has been absent half the time, defendant has remained the primary caregiver, and the children have expressed a preference to live with defendant – support a finding of a change in circumstances with respect to best interest factors c, d, e, and i.

With respect to defendant's second ground, bigamy is prohibited in Michigan. MCL 551.5. Although plaintiff complied with the letter of the law by divorcing defendant, his attempt to live with both women in the same household defied the spirit of the law. Had this living arrangement occurred over the objection of at least one of the women, it most certainly would have resulted in a stressful living situation that would have affected the children. *Vodvarka*, *supra*, p 513-514. This, too, would have supported a finding of a change in circumstances with respect to best interest factors d, f, and l.

With respect to defendant's third ground, defendant alleges that the parties' daughter reached majority after the parties divorced, the daughter severed all contact with plaintiff when she reached majority, and plaintiff became enraged and began threatening the daughter as previously discussed. Counseling a child that it is the child's duty to kill the child's sister could

² Although it is not clear from the record exactly when plaintiff's marriage to the second wife occurred, defendant alleges that the marriage occurred within two months of the entry of the judgment of divorce – either before or after. Apparently in accordance with Islamic tradition, plaintiff divided his time equally between his two "wives," spending every other night at the other "wife's" house.

certainly have a significant effect on the child's well-being. *Vodvarka, supra*, p 513. Therefore, this too supports a change in circumstances with respect to best interest factor k.³

Accordingly, we hold that the trial court clearly erred in failing to evaluate whether proper cause existed and in denying defendant's motion for a change in custody because defendant has established by a preponderance of the evidence that both proper cause *and* change of circumstances exist to revisit the custody order.

Reversed and remanded for an evidentiary hearing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens

³ With respect to defendant's remaining two claims, there is no indication in the record that the alleged abuse by plaintiff, fear of plaintiff, or threats by plaintiff began after the judgment of divorce. For a finding of changed circumstances, "the change in circumstances must have occurred *after* entry of the last custody order." *Vodvarka, supra*, p 514 (emphasis in original). We, therefore, cannot say that these grounds support a finding of a change in circumstances.